

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Application of	§	
Michael R. Schramm	§	
	§	Group Art Unit: 1734
Serial No.: 10/092,878	§	
	§	Examiner: Brenda A.
Filed: March 6, 2002	§	Lamb
	§	
For: Spill-Proof Coloring Container	§	

REPLY BRIEF TO THE EXAMINER'S ANSWER

Commissioner of Patents
Alexandria, VA 22313-1450

This correspondence is being electronically transmitted to the patent office via an EFS-Web transmission on February 1, 2008.

Dear Sir:

Pursuant to 37 CFR § 41.41, appellant submits this Reply Brief in response to the Examiner's Answer dated December 26, 2007 which maintained the rejection of claims 21-45 and 47-54 of the captioned application. Appellant submits that the Examiner erred in rejecting the claims, and respectfully requests reversal of the rejection.

EA #9 Grounds of Rejection - 35 USC § 112, 1st Para: Non-Annular Funnel – Failing to Teach:

In rejecting appellant's claims, appellant respectfully suggests that the examiner has confused the definition of the word "cord" and the definition of the word "breadth". Webster's dictionary defines the word "cord" as "a line segment joining two points on a curve", whereas Webster's dictionary defines the word "breadth" as "the measure or dimension from side to side". Thus with respect to a circle or an ellipse, while a bread dimension is always coincident with a cord, a cord is not necessarily coincident with a breadth dimension. More specifically, a breadth dimension is the measurement of the full width of a geometric entity such as a circle or an ellipse, whereas only in the case of cord passing through the axis of a circle or an ellipse is a cord coincident with a breadth dimension. Accordingly, appellant respectfully urges that by use of the claim limitations "non-annular funnel" and "wherein a cross-sectional shape of said funnel ... defines a cross-sectional shape having a first breadth dimension and a second breadth dimension and wherein said first breadth dimension is greater than said second breath dimension", appellant's claims expressly exclude a funnel of a circular cross-section. Had appellant used the word "cord" in place of the word "breadth" as the examiner seems to suggest, the same argument would not apply. Contrary to the examiner's assertion, it would be geometrically impossible for a funnel with a cross-sectional shape "having a first breadth dimension and a second breadth dimension and wherein said first breadth dimension is greater than said second breath dimension" to read on a funnel having a circular cross-sectional shape. See also appellant's argument #1 in appellant's October 13, 2007 appeal brief and appellant's argument in appellant's March 3, 2007 office action response.

EA #9 Grounds of Rejection - 35 USC § 112, 1st Para: Non-Annular Funnel – Breadth:

The examiner effectively argues that "the term "non-annular" is too broad as reads on a variety of configurations beyond a funnel configuration having an elliptical cross-section. Appellant respectfully maintains that the examiner has applied the wrong test and that the examiner's argument is not supported in law. Appellant respectfully suggests that 35 USC § 112 does not require an applicant to described every conceivable configuration that an applicant's claim language may cover, rather 35 USC § 112 requires that an applicant's disclosed configuration supports applicant's claim language. Applying this argument to appellant's application, it is of no concern that appellant's disclosure did not

describe a funnel having rectangular cross-section (i.e. a configuration that “non-annular” reads upon), as long as appellant’s application described at least one “non-annular” configuration (i.e. appellant’s funnel of elliptical cross-section) that supports the claim language. Furthermore, appellant respectfully points out that the functional geometric shape of the funnel of several patented containers has been held to be allowable subject matter. See for instance claim 1 of 5,246,046, claims 1 and 10 of 5,495,876, and claims 1 and 10 of RE36,131. More specifically, see claim 36 of RE39,443 which specifically recites a “non-cylindrical/non-conical funnel”. See also appellant’s argument #1 in appellant’s October 13, 2007 appeal brief and appellant’s argument in appellant’s March 3, 2007 office action response.

EA #9 Grounds of Rejection - 35 USC § 112, 1st Para: Non-Edible Utensil:

Although appellant believes that it is inherently incredible that anyone, much less one having ordinary skill in the art, would confuse appellant’s disclosed utensils (e.g. a brush, a spoon, a wire egg dipper, a pair of tongs, a straw, etc.) for edible utensils, in response to the examiner’s rejection and in an effort to reduce issues on appeal, appellant previously amended appellant’s claims to delete the rejected term “non-edible”. However, the examiner has not allowed the amendment to be entered. See also appellant’s March 3, 2007 office action response.

EA #9 Grounds of Rejection - 35 USC § 112, 1st Para: Dipping Device – Handle & Egg Retention:

Although appellant previously provided strong arguments for the disclosure of a “dipping device having a handle portion and an egg retention portion”, in response to the examiner’s rejection and in an effort to reduce issues on appeal, appellant previously amended appellant’s claims to delete the rejected term “dipping device having a handle portion and an egg retention portion”. However, the examiner has not allowed the amendment to be entered. See also appellant’s March 3, 2007 office action response.

EA #9 Grounds of Rejection - 35 USC § 112, 1st Para: Dipping Device – Handle & Open Loop:

Although appellant previously provided strong arguments for the disclosure of a “utensil having a handle portion and an open loop portion”, in response to the examiner’s rejection and in an

effort to reduce issues on appeal, appellant previously amended appellant's claims to delete the rejected term "utensil having a handle portion and an open loop portion". However, the examiner has not allowed the amendment to be entered. See also appellant's March 3, 2007 office action response.

EA #9 Grounds of Rejection - 35 USC § 112, 1st Para: Utensil – Handle & Non-Handle Portions:

The examiner argues that "the originally filed specification fails to teach or suggest a utensil having a handle portion and a non-handle portion". Appellant respectfully points out that brush utensil 60 (see for instance drawing figure 3) clearly discloses a utensil having a handle portion (i.e. the depicted handle) and a non-handle portion (i.e. the depicted bristles). Appellant urges that it would be inconceivable that a person having ordinary skill in the art would not be able to distinguish appellant's disclosed utensil handle portion from appellant's disclosed utensil non-handle portion. See also appellant's argument #1 in appellant's October 13, 2007 appeal brief and appellant's argument in appellant's March 3, 2007 office action response.

Most recently, the examiner has provided a rebuttal of the appellant's argument by stating, "A utensil including a handle portion and non-handle-portion encompasses a variety of tools not disclosed by appellant in the originally filed specification". Again, appellant agrees with the examiner's statement but respectfully urges that such statement is immaterial. Appellant respectfully argues that the question is not are there other objects not disclosed in the specification might fall within the scope of the term, but rather did the specification disclose an object that falls within the scope of the term. And the answer is that the disclosed brush utensil 60 falls within and supports the term.

EA #9 Grounds of Rejection - 35 USC § 112, 1st Para: Utensil – Unconnected Objects:

The examiner argues that "the originally filed specification fails to teach or suggest the edible article and the utensil are "unconnected" objects". Appellant respectfully points out that brush utensil 60 and egg work piece 50 were clearly depicted as two distinct, separate, and unconnected objects (see drawing figure 3). See also appellant's argument #1 in appellant's October 13, 2007 appeal brief and appellant's argument in appellant's March 3, 2007 office action response.

Most recently, the examiner has provided two rebuttal's of the appellant's argument, namely 1) "... when the utensil touches the edible article to manipulate the edible article the utensil is temporarily

associated with which reads on connected with the edible article.”, and 2) “... the Price edible article or edible commodity/object, discrete or distinct amount of fluid therein as shown in Figure 2, is unconnected prior to insertion of the non-edible utensil or spoon 32 in the container such that the recited utensil can manipulate the article.”. With respect to rebuttal 1, in the first instance, in addition to what the drawings clearly depicting the two unconnected objects, the admission by the examiner that the utensil is **temporarily** (as opposed to permanently) associated with the edible article substantiates appellant’s argument that the two objects are unconnected. And in the second instance, a mere association such as the utensil temporarily touching the edible article to manipulate the article does not cause the utensil to become connected to the article. With respect to rebuttal 2, because a fluid is not an article, and because a utensil does not become connected to an article by dipping a utensil into a fluid, Price does not teach appellant’s claimed “... said edible article and said non-edible utensil define two discreet unconnected objects such that said non-edible utensil is operable to manipulate said edible article”. Further, appellant teaches an edible article and a non-edible utensil in addition to a discrete amount of fluid contained within the container.

EA #9 Grounds of Rejection - 35 USC § 112, 2nd Para: Discreet vs. Discrete:

The examiner points out that claim 49 is rendered unclear because of the use of the word “discreet”. Appellant has previously averred that the spelling of the word “discreet” was a typographical error and should have been spelled as “discrete”. In response to the examiner’s identification of the misspelled word, and in an effort to effectively adopt the examiner’s suggestion and reduce items on appeal, appellant amended claim 49 to have the subject word read “discrete”. However, the examiner has not allowed the amendment to be entered. See also appellant’s March 3, 2007 office action response.

EA #9 Grounds of Rejection - 35 USC § 112, 2nd Para: Potion vs. Portion:

The examiner points out that claims 22, 34, and 41 are rendered unclear because of the use of the word “potion”. Applicant avers that the spelling of the word “potion” was a typographical error and should have been spelled as “portion”. In response to the examiner’s identification of the misspelled word, applicant has amended claims 22, 34, 41, and 48 to have the subject word read

“portion”. The examiner points out that claims 22, 34, and 41 are rendered unclear because of the use of the word “portion”. Appellant has previously averred that the spelling of the word “portion” was a typographical error and should have been spelled as “portion”. In response to the examiner’s identification of the misspelled word, and in an effort to effectively adopt the examiner’s suggestion and reduce items on appeal, appellant amended claims 22, 34, 41, and 48 to have the subject word read “portion”. However, the examiner has not allowed the amendment to be entered. See also appellant’s March 3, 2007 office action response.

EA #9 Grounds of Rejection - 35 USC § 103(a) – Obviousness – Law ‘239+:

Appellant maintains appellants’ arguments provided in argument 2 of appellant’s appeal brief filed October 13, 2007 in opposition to the examiner’s rejection of claims 21-22, 24-28, 30-34, 36-45, and 47-51 under 35 USC § 103(a) as being unpatentable over the combination of Law ‘239 in view of Schramm ‘046, Hunter (GB) 1,428,356, Martindale ‘797, Price ‘678, and Japan 11-227388. For convenience, appellant provides a copy of appellants’ October 13, 2007 argument #2 below:

“... Appellant respectfully traverses the Examiner’s rejection on the basis that appellant’s invention in the appended modified claims is substantially different than the cited prior art patents. Appellant notes that while Schramm ‘046, Hunter (GB) 1,428,356, Martindale ‘797, Price ‘678, and Japan 11-227388 are directed toward spill resistant containers, Law ‘239 is directed towards a conventional egg crate type egg coloring container. While Law ‘239 does recognize spilling as a problem, Law ‘239 attempts to solve the spilling problem by providing an egg crate structure having multiple egg containing compartments that eliminate the need to move separate bowls to “create work room”. This in spite of art such as Hunter (GB) 1,428,356 and Price ‘678 being available to Law. Law’s solution is of course inadequate as it only minimally reduces spills and leaves the egg crate type container extremely susceptible to spilling when tipped. Law ‘239 does not provide for an egg container that includes a funnel or that prevents spillage regardless of the orientation of the container. Appellant respectfully suggests that there is no obvious motivation to combine the cited references. On the contrary, appellant’s current invention and the cited prior art are far removed. The invention of a container that provides ready access to a removable egg and yet provides for the resistance to spillage of liquid contents of the container when the container is oriented in any position is distinctly

nonobvious. Appellant respectfully suggests that having a funnel member of a size and shape that will allow for the passage of an egg is counterintuitive. Appellant points to the previously cited allowance of US patent RE39,443 (SN 09/867,320) as substantiation of a container having a “non-cylindrical/non-conical funnel” as being patentable. It is the combination of applicant’s funnel, funnel geometry, container geometry, container contents, and container spill resistance regardless of container orientation that combine to provide the claimed function and thus contribute to patentability of appellant’s invention. Based on the novel and nonobvious nature of appellant’s invention, appellant respectfully requests that the rejection be withdrawn.

The examiner has stated that, “With respect to claim 25, 31, 37, and 43, Schramm, Japan ‘388 and Martindale each teach constructing the container from a plastic material. The method of forming the container from plastic in the form of a sheet is not germane to issue of the patentability of the device/container itself”. Appellant respectfully traverses the examiner’s rejection. Appellant notes that appellant did not claim the “method” of forming the container but rather the composition or construction of the container (i.e. what it is made of). Appellant represents that the container being constructed of plastic sheet formed a portion of appellant’s disclosure and is considered by the appellant to be part of appellant’s invention. Appellant does not dispute that other patents teach a container formed of plastic sheet. On the contrary, appellant readily acknowledges that for instance claims 8 and 28 of Schramm ‘138 read in part, “... wherein said container defines a container consisting of formed plastic sheet”. Such recitation does not stand as a reference against patentability, but rather as a clear precedent that such claim language is indeed germane to patentability and that such claim language is indeed patentable. However, appellant further respectfully points out that the claims in question, claims 25, 31, 37, and 43, are all dependent claims and that as such the claims must be examined in combination with all of the limitations found in the claims from which they depend.

The examiner has stated that, “With respect to claims 24, 30, 36, and 42, Schramm, Japan ‘388 and Martindale each show in their figures that the container is comprised of a first and a second member. Schramm, Japan ‘388 and Martindale each show the container having a first member which is detachably engagable to the second member which is obviously at least partially sealingly engagable with the second member in order to prevent leakage of the contents of the container”. Appellant does not dispute the noted teachings of the cited patents. However, appellant again respectfully points out

that the claims in question, claims 24, 30, 36, and 42, are all dependent claims and that as such the claims must be examined in combination with all of the limitations found in the claims from which they depend. When consider in combination with the claims from which they depend, appellant suggests that the subject dependent claims are allowable.

The examiner has stated that, “With respect to claims 26, 32, 38, and 44, ... the wall of the container below the funnel and including the funnel of the Schramm, Japan ‘388 and Martindale container can serve as a flow channel”. Appellant respectfully traverses the examiner’s assertion. Appellant’s flow channel is far removed from the cited teachings. The American Heritage dictionary defines a channel as, “trench, furrow, or groove”. Clearly the flow channel (i.e. a trench, furrow, or groove) taught in appellant’s application is not found or taught in the cited prior art. Furthermore, appellant has claimed the funnel distinct from a wall and applicant has limited the flow channel to being formed within a wall. In contrast, the examiner is suggesting that “the wall of the container below the funnel and including the funnel of the Schramm, Japan ‘388 and Martindale container can serve as a flow channel”. If the entire wall (and even funnel) is to be considered the flow channel, then the so-called flow channel of the cited art cannot be formed within a wall. Thus appellant suggests that appellant’s flow channel defines over the all cited art.”

EA #9 Grounds of Rejection - 35 USC § 103(a) – Obviousness – Law ‘239+;

Appellant maintains appellants’ arguments provided in argument 3 of appellant’s appeal brief filed October 13, 2007 in opposition to the examiner’s rejection of claims 23, 29, and 35 under 35 USC § 103(a) as being unpatentable over the combination of Law ‘239 in view of Schramm ‘046, Hunter (GB) 1,428,356, Price ‘678, Martindale ‘797, and Japan 11-227388 in further view of Lintvedt ‘294. For convenience, appellant provides a copy of appellants’ October 13, 2007 argument #3 below:

“... Inasmuch as claims 23, 29, and 35 depend from independent claims that are believed to be novel and nonobvious, and inasmuch as claims 23, 29, and 35 inherently include all the limitations of the independent claims from which they depend, appellant respectfully requests that the rejection be withdrawn.”

EA #9 Grounds of Rejection - 35 USC § 103(a) – Obviousness – Law ‘239+:

Appellant maintains appellants’ arguments provided in argument 4 of appellant’s appeal brief filed October 13, 2007 in opposition to the examiner’s rejection of claims 47 and 48 under 35 USC § 103(a) as being unpatentable over the combination of Law ‘239 in view of Schramm ‘046, Hunter (GB) 1,428,356, Price ‘678, Martindale ‘797, and Japan 11-227388 and if necessary, McShane ‘687. For convenience, appellant provides a copy of appellants’ October 13, 2007 argument #4 below:

“... Appellant respectfully traverses the examiner’s rejection. As detailed earlier in this appeal brief, a container having a “non-cylindrical/non-conical funnel” (i.e. a non-annular funnel) has been held to be allowable by virtue of several patents including US RE39,443. Appellant notes that it is the non-annular shape of the funnel, and not the overall shape of the container (such as McShane) that appellant is claiming. Accordingly, appellant respectfully requests that the rejection be withdrawn.”

EA #9 Grounds of Rejection - 35 USC § 102(b) – Anticipation – Price:

Appellant maintains appellants’ arguments provided in argument 5 of appellant’s appeal brief filed October 13, 2007 in opposition to the examiner’s rejection of claims 34, 36, 38, 39 and 47-49 under 35 USC § 102(b) as being anticipated by Price 3,840,678. For convenience, appellant provides a copy of appellants’ October 13, 2007 argument #5 below:

“... Appellant respectfully traverses the examiner’s rejection based on the reasons provided below. Further, appellant notes that the examiner states that “Price teaches a kit comprising ... an edible article or edible commodity/object, ... and a non-edible utensil or spoon 32 removably contained within the container wherein the article and the non-edible utensil are unconnected as shown in Figure 2 such that the recited utensil can manipulate the article”. Appellant respectfully points out that neither figure 2 or any other figure of Price shows an edible article and a non-edible (or edible) utensil. The spoon 32 which includes an edible handle is a single (not unconnected) utensil. Further, absent the utensil itself, Price does not teach an edible article. Thus in Price there is no “edible article and a non-edible (or edible) utensil”. Appellant also refers the board to appellant’s comments with respect to the flow channel and separate container portions. Accordingly, based on the teaching of Price noted by the appellant, and based on the reasons provided below, appellant respectfully suggests

that appellant's claimed invention is not anticipated by Price and appellant respectfully requests that the examiner's rejection be withdrawn.

With respect to claim 34, appellant noted in his immediately previous office action response, that appellant amended claim 34 to add the additional limitation of "non-fluid edible matter removably contained within said container". Appellant respectfully points out that the examiner has repeated her rejection without addressing the new limitations that appellant previously added. Accordingly, appellant believes claim 34 and all claims depending therefrom define over and are not anticipated by Price '678.

With respect to claim 47, appellant respectfully traverses the examiners argument that Price '678 anticipates claim 47. Claim 47 includes the limitation "non-annular funnel". It is the "non-annular funnel" that provides for a greater container volumetric utilization. Price '678 teaches and claims a conical funnel (see col 2, line 2 and fig 2). A conical funnel, being a subset of an annular funnel, thus does not teach, disclose, or anticipate appellant's "non-annular" funnel.

With respect to claim 49, appellant noted in his immediately previous office action response, that appellant amended claim 49 to add the additional limitation of "wherein said edible article and said non-edible utensil define two discreet unconnected objects such that said non-edible utensil is operable to manipulate said edible article". Appellant respectfully points out that Price '678 merely discloses a singular utensil that is inserted and withdrawn from a container, whereas appellants' invention discloses a non-edible utensil that is separate from and used in combination with an edible article. Accordingly, appellant believes claim 49 as defines over and is not anticipated by Price '678. Inasmuch as claims 34 and 49 have been amended to define over Price '678 and inasmuch as claim 47 is not anticipated by Price '678, appellant respectfully requests that the rejection be withdrawn."

EA #9 Grounds of Rejection - 35 USC § 102(b) – Anticipation – Price/Lintvedt:

Appellant maintains appellants' arguments provided in argument 6 of appellant's appeal brief filed October 13, 2007 in opposition to the examiner's rejection of claim 35 under 35 USC § 103(a) as being unpatentable over Price '678 in view of Lintvedt '294. For convenience, appellant provides a copy of appellants' October 13, 2007 argument #6 below:

“... Inasmuch as claim 35 depends from independent claim 34 which applicant believes to be novel and nonobvious, and inasmuch as claim 35 inherently includes all the limitations of independent claim 34 from which claim 35 depends, appellant respectfully requests that the rejection be withdrawn”

EA #9 Grounds of Rejection - 35 USC § 102(b) – Anticipation – McCombs:

Appellant maintains appellants’ arguments provided in argument 8 of appellant’s appeal brief filed October 13, 2007 in opposition to the examiner’s rejection of claims 40-42 and 44-45 under 35 USC § 102(b) as being anticipated by McCombs 1,254,714. For convenience, appellant provides a copy of appellants’ October 13, 2007 argument #8 below:

“... Appellant respectfully traverses the examiner’s rejection. Appellant acknowledges the definition of “colorant” as provided by the examiner from the American Heritage dictionary. However, as appellant noted in appellant’s previous office action response, appellant previously amended the claim 40 to delete the limitation of “a discrete unit of liquid dye concentrate”. Thus, inasmuch as McCombs’ container of paint does not teach a colorant tablet, a discrete article of colorant or a colorant pill defining a colorant powder concentrate enclosed within a liquid soluble container, McCombs does not teach appellant’s colorant, and thus does not teach all of the elements of claim 40 and therefore does not anticipate claim 40. Appellant further respectfully suggests that in addition to claim 40, all of the claims depending from claim 40, which inherently include all of the limitations of claim 40, define over and are not anticipated by McCombs. Accordingly, appellant respectfully requests that the rejection be withdrawn. Further appellant directs the board’s attention to appellant’s previous arguments (in this appeal brief) with respect to appellant’s flow channel’s and appellant’s container portions.”

EA #9 Grounds of Rejection - 35 USC § 103(a) – Obviousness – McCombs/Schramm:

Appellant maintains appellants’ arguments provided in argument 9 of appellant’s appeal brief filed October 13, 2007 in opposition to the examiner’s rejection of claim 43 under 35 USC § 103(a) as being unpatentable over McCombs ‘714 in view of Schramm ‘046. For convenience, appellant provides a copy of appellants’ October 13, 2007 argument #9 below:

“... Inasmuch as claim 43 depends from independent claim 40 which appellant believes to be novel and nonobvious, and inasmuch as claim 43 inherently includes all the limitations of independent claim 40 from which claim 43 depends, appellant respectfully requests that the rejection be withdrawn. Further appellant directs the board’s attention to appellant’s previous arguments (in this appeal brief) with respect to appellant’s container being constructed of (i.e. not a method claim) formed sheet (see also claims 8 and 28 of US patent 6,386,138)”

EA #9 Grounds of Rejection - 35 USC § 102(e) – Anticipation – Martindale;

Appellant maintains appellants’ arguments provided in argument 10 of appellant’s appeal brief filed October 13, 2007 in opposition to the examiner’s rejection of claims 40 and 43-45 under 35 USC § 102(e) as being anticipated by Martindale 5,758,797. For convenience, appellant provides a copy of appellants’ October 13, 2007 argument #10 below:

“The Examiner ... argues that Martindale ‘797 teaches every element of the claimed kit as set forth in claim 40 including a colorant defining a discrete/distinct article. The examiner argues that the predetermined quantity of colorant powder arranged in the container of Martindale defines “a discrete article of colorant”. Appellant respectfully traverses the examiner’s rejection. Appellant points out that Webster’s dictionary defines the word “article” as, “An individual thing or element of a class; a particular object or item”. For further reference, Webster’s dictionary further defines the words “thing” as “An individual object”, “Object” as “A material thing” and “A thing that forms an element”, and “Item” as “A single article or unit in a collection”. Thus the powder of Martindale, which comprises a plurality of colorant powder members or small items/grains/ does not teach or anticipate appellant’s singular discrete “article”. Accordingly, appellant respectfully requests that the rejection be withdrawn.

Appellant further respectfully suggests that in addition to claim 40, all of the claims depending from claim 40, which inherently include all of the limitations of claim 40, define over and are not anticipated by Martindale. Further appellant directs the board’s attention to appellant’s previous arguments (in this appeal brief) with respect to appellant’s flow channel’s and with respect to appellant’s container being constructed of (i.e. not a method claim) formed sheet (see also claims 8 and 28 of US patent 6,386,138).”

Additionally, specifically with respect to claim 44, the examiner argues that the cylindrical wall of Martindale forms a “flow channel”. Inasmuch as applicant claims “at least one liquid flow channel formed in a wall of said container”, to suggest that Martindale’s wall forms such a flow channel is to suggest that a wall is formed in Martindale’s wall. Appellant respectfully urges that such an argument simply does not make sense – i.e. “a wall formed in a wall”. Appellant’s channel is a discrete channel, corrugation or groove that is formed in the wall as opposed to a mere wall.

EA #9 Grounds of Rejection - 35 USC § 103(a) – Obviousness – Martindale:

Appellant maintains appellants’ arguments provided in argument 11 of appellant’s appeal brief filed October 13, 2007 in opposition to the examiner’s rejection of claim 42 under 35 USC § 103(a) as being unpatentable over Martindale ‘797. For convenience, appellant provides a copy of appellants’ October 13, 2007 argument #11 below:

“... Inasmuch as claim 42 depends from independent claim 40 which appellant believes to be novel and nonobvious, and inasmuch as claim 42 inherently includes all the limitations of independent claim 40 from which claim 42 depends, appellant respectfully requests that the rejection be withdrawn.”

EA #9 Grounds of Rejection - 35 USC § 103(a) – Obviousness – Martindale/Lintvedt:

Appellant maintains appellants’ arguments provided in argument 12 of appellant’s appeal brief filed October 13, 2007 in opposition to the examiner’s rejection of claim 41 under 35 USC § 103(a) as being unpatentable over Martindale ‘797 in view of Lintvedt ‘294. For convenience, appellant provides a copy of appellants’ October 13, 2007 argument #12 below:

“... Inasmuch as claim 41 depends from independent claim 40 which appellant t believes to be novel and nonobvious, and inasmuch as claim 41 inherently includes all the limitations of independent claim 40 from which claim 41 depends, appellant respectfully requests that the rejection be withdrawn”

EA #9 Grounds of Rejection - 35 USC § 103(a) – Obviousness – Price/Meth:

Appellant maintains appellants' arguments provided in argument 13 of appellant's appeal brief filed October 13, 2007 in opposition to the examiner's rejection of claims 52-54 under 35 USC § 103(a) as being unpatentable over Price '678 in view of Meth '599. For convenience, appellant provides a copy of appellants' October 13, 2007 argument #13 below:

"Appellant represents that claims 52-54 include at least one unique and nonobvious limitation that defines appellant's utensil and appellant's colorable work piece (in the case of claim 52) or appellant's article (in the case of claims 53 and 54) to define discrete unconnected items. Appellant notes that this limitation is similar to a limitation found in claim 49 and is addressed in appellant's comments in argument #1 of this appeal brief under the heading "**Unconnected objects**". Inasmuch as appellant's amended claims are believed to be novel and nonobvious and to define over Price '678 and Meth '599 whether alone or in combination, appellant respectfully request's that the examiner's rejection be withdrawn."

EA #10 Response to Argument - Unconnected Objects:

The examiner provides two rebuttal's of the appellant's argument, namely 1) "... when the utensil touches the edible article to manipulate the edible article the utensil is temporarily associated with which reads on connected with the edible article.", and 2) "... the Price edible article or edible commodity/object, discrete or distinct amount of fluid therein as shown in Figure 2, is unconnected prior to insertion of the non-edible utensil or spoon 32 in the container such that the recited utensil can manipulate the article.". With respect to rebuttal 1, in the first instance, in addition to what the drawings clearly depicting the two unconnected objects, the admission by the examiner that the utensil is **temporarily** (as opposed to permanently) associated with the edible article substantiates appellant's argument that the two objects are unconnected. And in the second instance, a mere association such as the utensil temporarily touching the edible article to manipulate the article does not cause the utensil to become connected to the article. With respect to rebuttal 2, because a fluid is not an article, and because a utensil does not become connected to an article by dipping a utensil into a fluid, Price does not teach appellant's claimed "... said edible article and said non-edible utensil define two discreet unconnected objects such that said non-edible utensil is operable to manipulate said edible article".

Further, appellant teaches an edible article and a non-edible utensil in addition to a discrete amount of fluid contained within the container.

EA #10 Response to Argument - Handle & Non-Handle Portions:

The examiner has rebutted appellant's argument by stating, "A utensil including a handle portion and non-handle-portion encompasses a variety of tools not disclosed by appellant in the originally filed specification". Appellant agrees with the examiner's statement but respectfully urges that such statement is immaterial. Appellant respectfully argues that the question is not are there other objects not disclosed in the specification might fall within the scope of the term, but rather did the specification disclose an object that falls within the scope of the term. And the answer is that the disclosed brush utensil 60 falls within and supports the term.

EA #10 Response to Argument – Price Non-Fluid Edible Matter and Utensil:

The examiner has rebutted appellant's argument by stating that, "... Price clearly shows in his Figures that his kit includes at least one utensil (spoon 32) *and* non-fluid edible matter (the bread stick 26) ...". Appellant respectfully points out that the bread stick forms the handle of the spoon. Thus Price does not teach at least one utensil *and* (i.e. in addition to the utensil) non-fluid edible matter.

EA #10 Response to Argument – Flow Channel:

The examiner argues that because a container wall falls within the definition of a fluid flow channel, the prior teaches a container having a flow channel. Appellant urges that such argument negates appellant's teaching of a channel (i.e. a groove or corrugation) formed in a wall of a container. Using the examiner's reasoning, appellant might have claimed a wall formed in a wall. Appellant urges that such claiming would not be reasonable and that appellant's flow channel defines over a mere wall.

Conclusion

In view of the reply above, it is submitted that the Examiner erred in rejecting the claims on appeal. Appellant therefore respectfully requests that this Honorable Board reverse the Examiner's rejection of the claims. If the Board has any questions or comments which may be resolved over the telephone, the board is requested to call Michael R. Schramm at 801-710-7793.

DATE: February 1, 2008

Respectfully submitted,



Michael R. Schramm

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